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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 5, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA

AMENDED EXCEPTIONS OF THE UNITED STATES TO THE REPORT OF THE SPECIAL MASTER FILED NOVEMBER 10, 1952

Pursuant to the orders of the Court (375 U.S. 927, 990), the United States files the following amended exceptions to the Report of the Special Master filed November 10, 1952, in lieu of the exceptions filed by the United States on January 2, 1953:

I

With respect to the ultimate recommendations of the Special Master appearing at pages 2 to 5 of his report:

1. The United States excepts to the recommendation of the Special Master that "In front of harbors the outer limit of inland waters is to embrace an anchorage reasonably related to the physical surroundings and the service requirements of the port, and, absent contrary evidence, may be assumed to be the

line of the outermost permanent harbor works" (Report, p. 4), insofar as it would embrace as inland waters areas not substantially enclosed or sheltered from wind and storm by natural land formations or by artificial structures erected before May 22, 1953.[1]

2. The United States excepts to the recommendation of the Special Master that the ordinary low-water mark is to be determined "as it exists at the time of survey" (Report, p. 4), insofar as it would give effect to artificial changes made after May 22, 1953.

II

With respect to preliminary findings and rulings of the Special Master appearing at pages 5 to 48 of his Report:

3. The United States excepts to the ruling of the Special Master that he was not bound by the formal statement of the Department of State with respect to the past policy of the United States as to what waters have been claimed as inland waters. (Report, p. 22.)

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[1] Reference in this and other exceptions to May 22, 1953, the date of the Submerged Lands Act, does not mean that we think the Special Master erred in failing to foresee the Submerged Lands Act or to take note of what its effect would be. Our position is that he was mistaken in giving consideration to any artificial structures created after California was admitted to the Union, but that the Submerged Lands Act has now given the State the benefit of such structures in existence on its date. Thus, it is only as to subsequent structures that our objection continues to have force. The Act has simply eliminated part of our objection, without changing the nature of or grounds for the part that remains.

4. The United States excepts to the ruling of the Special Master that the date of October 28 [27], 1947, when the decree in this case was entered, is the critical date for the determination of the policy of the United States as it applies in this case.[2] (Report, p. 22.)

5. The United States excepts to the ruling of the Special Master admitting in evidence the testimony of Dr. Hudson in derogation of statements of the Department of State defining the waters formerly or then claimed by it to be inland waters. (Report, p. 22.)

6. The United States excepts to the failure of the Special Master to find that no exercise of authority with respect to offshore waters by the State of California can *per se* have any effect on the status of such waters as between the United States and foreign countries or between the United States and California. (Report, p. 31.)

7. The United States excepts to the failure of the Special Master to find that before, as well as after,

[2] The United States originally contended that the national policy relevant to this case was the policy as it might be from time to time, so that the supplemental decree to be entered should be guided by the policy in effect on the date of its entry. We believe that this principle continued to be applicable until May 22, 1953, but that the Submerged Lands Act then terminated this process of continuing change and fixed the rights of the State by reference to the national policy in effect on that date. Thus here also the Submerged Lands Act has eliminated part of our objection—that is, insofar as it related to changes in national policy after May 22, 1953—without changing the nature of or grounds for the part that remains.

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1933, the California legislature, by its legislation describing county boundaries, recognized that the seaward boundary of the State ran three miles from the mainland shore in the area now claimed by the State as the "unit area" of inland water. (Report, p. 39.)

8. The United States excepts to the conclusion of the Special Master that the decree entered by this Court on October 27, 1947 (332 U.S. 804, 805), decreeing that the United States had paramount rights in an area bounded in part by the "ordinary low-water mark," was not a judicial determination that the area referred to was bounded, in the parts so described, by a line marking the mean of all low tides. (Report, p. 43.)

9. The United States excepts to the holding of the Special Master that California's proprietary rights in submerged lands are affected by artificial extensions of the shore, insofar as it would give effect to extensions made after May 22, 1953. (Report, pp. 44–46.)

10. The United States excepts to the ruling of the Special Master that the construction of artificial harbor works increases the area of the State's proprietary rights in submerged lands, insofar as it would give effect to harbor works erected after May 22, 1953. (Report, pp. 46–48.)

11. The United States excepts to the ruling of the Special Master that anchorages used in connection with ports and harbors are *per se* inland waters. (Report, pp. 47–48.)

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

APRIL 1964.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 5, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES IN SUPPORT OF AMENDED EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER FILED NOVEMBER 10, 1952

Only the 1st, 2d, 9th, 10th and 11th exceptions, above, will be discussed in this brief. The others relate to rulings which, while we believe them to be wrong, were not prejudicial to the United States, in view of the ultimate conclusions of the Special Master. We preserve the points in case they become material in connection with exceptions to be taken by California.

ARGUMENT

I

INLAND WATERS DO NOT INCLUDE OPEN ROADSTEADS

The Special Master recommended (Report, p. 4):

> In front of harbors the outer limit of inland waters is to embrace an anchorage reasonably

> related to the physical surroundings and the service requirements of the port, and, absent contrary evidence, may be assumed to be the line of the outermost permanent harbor works.

The United States has excepted to this recommendation and to a similar finding at pages 47–48 of the Report, insofar as they would treat as inland waters any area not substantially sheltered from wind and storm. Exceptions Nos. 1 and 11, *supra*.[1] To the extent that the recommendation would permit recognition of an open roadstead or anchorage area as "inland waters" it is contrary to international law and is unjustified.

1. INTERNATIONAL LAW

a. Background

Open roadsteads—that is, unsheltered areas used as anchorages in front of coastal ports—have long been recognized adjuncts of ports. Lord Hale, in *De Portibus Maris,* wrote (Hargrave, *Collection of Tracts Relative to the Law of England* (1787), p. 46):

> A *road* is an open passage of the sea, that receives its denomination commonly from some part [port?] adjacent; which though it lie out at sea, yet, in respect of the situation of the land adjacent, and the depth and wideness of the place, is a safe place for the common riding or anchoring of ships; as Dover road, Kirkley road, Hung road.

[1] Further aspects of these and other exceptions, limiting the kinds of shelter that we think may properly be given effect for the purposes of this case, are discussed under Point II, *infra*, pp. 16–26. The present point deals only with the question of open roadsteads that have no substantial shelter of any kind.

Lord Hale, however, did not discuss the jurisdictional status of roadsteads as inland or territorial waters. The distinction between inland and territorial waters was not clearly drawn until later, and in relation to the particular subject of roadsteads was scarcely mentioned until very recent times.

b. League of Nations Conference for the Codification of International Law, 1930

In preparation for the 1930 League of Nations Conference for the Codification of International Law, the Preparatory Committee circulated to the participating nations a series of questions on subjects of international law to be discussed. From the replies, the committee formulated "Bases of Discussion," which were submitted to the conference as, in effect, a proposed first draft of a convention formulating the international law on the subjects covered. The status of roadsteads in international law had received so little attention through the years that the committee's questionnaire on the law of the sea did not even include a question on the subject. However, in answering Question IV(c) as to "how the base line for measuring the breadth of territorial waters is to be fixed in front of ports" (*Bases of Discussion,*[2] p. 45), two nations, Denmark and The Netherlands, raised the subject of roadsteads. The Danish reply referred to a Royal Decree of January 19, 1927, regarding admission of foreign war vessels to Danish waters in peacetime,

[2] *League of Nations Conference for the Codification of International Law. Bases of Discussion.* Vol. II.—*Territorial Waters* (L.N. Doc. No. C.74.M.39.1929.V).

which defined the limits of the Copenhagen roadstead and provided (*id.*, p. 123; also at pp. 36 and 46):

> Danish internal waters comprise, in addition to the ports, entrances of ports, roadsteads, bays and firths, the waters situated between, and on the shoreward side of, islands, islets and reefs, which are not permanently submerged.

The Dutch reply included the following (*id.*, p. 177; also at pp. 46–47):

> As regards ports, a distinction should be drawn between: (1) ports in the strict sense of the term, where vessels enter a natural or artificial basin, and (2) roadsteads where vessels anchor, generally at some distance from the shore. In the former case, the inner limit of the territorial waters should follow the ends of the harbour walls, and for roadsteads the limit should follow the outer boundary of the roadstead as fixed by the State in accordance with its needs. Within that limit, the State should be entitled to exercise its sovereignty in the same way as on land or in ports, while a zone of territorial sea beyond the limit is essential to ensure free access to the roadstead at all times * * *.

Apparently inspired by these Danish and Dutch replies, the Preparatory Committee submitted a Basis of Discussion on the subject of roadsteads, pointing out that there had been no question on the subject and saying that it was presented for the purpose of securing consideration of it by the participating

nations. *Id.*, p. 47. Its proposal, Basis of Discussion No. 11, was as follows (*ibid.*):

> In front of roadsteads which serve for the loading and unloading of ships and of which the limits have been fixed for this purpose, territorial waters are measured from the exterior boundary of the roadstead. It rests with the coastal State to indicate what roadsteads are in fact so employed and what are the boundaries of such roadsteads from which the territorial waters are measured.

That this was intended to treat the roadsteads themselves as inland waters is made clear by Basis of Discussion No. 18,[8] which stated in pertinent part (*Bases of Discussion*, p. 63):

> The base line from which the belt of territorial waters is measured in front of bays, ports and roadsteads forms the line of demarcation between inland and territorial waters.

In reply to Question IV(c) on the fixing of the base line in front of ports, the United States had said

[8] That Basis of Discussion was derived from responses to Question VIII as to the "Line of demarcation between inland waters and territorial waters. A port. A bay. The mouth of a river." *Bases of Discussion*, p. 61. None of the replies to this question had referred to roadsteads (*Bases of Discussion*, pp. 61–63), except that of The Netherlands, which referred back to its reply to Question IV(c), quoted above (*id.*, p. 178), and that of Roumania, which said (*id.*, p. 63): "Ports, bays at the mouths of rivers, roads and harbours are part of the maritime territory of the State, and cannot form the subject of international regulations. They must remain under the sovereign jurisdiction of the coastal State."

(*Bases of Discussion*, p. 144), "There does not seem to have been any occasion on the part of the United States to differentiate between the shore-line in front of ports and other sections of the shore." However, the United States did indicate its willingness to treat roadsteads as inland waters if the conference should so determine (*Acts of Conference*, pp. 197, 200[4]).

While Basis of Discussion No. 11 would have treated roadsteads as inland waters, as the Special Master has done, it imposed a qualification that he has omitted: that the coastal State (i.e., nation) must indicate the limits of such roadsteads. Even with that qualification, however, the proposal was rejected in favor of treating roadsteads as part of the territorial sea. The final report of the Second Sub-Committee, to which the Second Committee assigned the study of Bases of Discussion Nos. 6 through 18 (see *Acts of Conference*, p. 209), stated (*id.*, p. 219):

> Roadsteads used for the loading, unloading and anchoring of vessels, the limits of which have been fixed for that purpose by the coastal State, are included in the territorial sea of that State, although they may be situated partly outside the general belt of territorial sea. The coastal State must indicate the roadsteads actually so employed and the limits thereof.

The accompanying observations explained that this change was made to protect the right of innocent passage through open roadsteads, and because it was not

[4] *Acts of the Conference for the Codification of International Law; Meetings of the Committees;* Vol. III, *Minutes of the Second Committee—Territorial Waters* (L.N. Doc. No. C. 351 (b).M.145(b).1930.V).

considered necessary to provide any marginal sea seaward of them.'

Because of inability to agree on the fundamental question of the breadth of the territorial sea, the Second Committee was unable to take even provisional action on the report of the Second Sub-Committee. However, it printed the report of the Second Sub-Committee as Appendix 2 to its own report, in the belief that it constituted "valuable material for the continuation of the study of the question." (*Acts of Conference*, pp. 211, 217.) The conference itself produced no agreement, and there the matter rested.

c. United Nations Conventions on the Law of the Sea, 1958

On November 21, 1947, the United Nations estab-

[1] The Sub-Committee's report stated (*Acts of Conference*, p. 219): "It had been proposed that roadsteads which serve for the loading and unloading of vessels should be assimilated to *ports*. These roadsteads would then have been regarded as inland waters, and the territorial sea would have been measured from their outer limits. It was thought, however, impossible to adopt this proposal. Although it was recognized that the coastal State must be permitted to exercise special rights of control and of police over the roadsteads, it was considered unjustifiable to regard the waters in question as inland waters, since in that case merchant vessels would have had no right of innocent passage through them. To meet these objections, it was suggested that the right of passage in such waters should be expressly recognized, the practical result being that the only difference between such "inland waters" and the territorial sea would have been the possession by roadsteads of a belt of territorial sea of their own. As, however, such a belt was not considered necessary, it was agreed that the waters of the roadstead should be included in the territorial sea of the State, even if they extend beyond the general limit of the territorial sea."

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lished the International Law Commission to promote the progressive development and codification of international law.[6] The law of the sea was among the subjects taken up by the Commission, and in the *Report of the International Law Commission Covering the Work of Its Eighth Session, 23 April – 4 July 1956,*[7] the Commission recounted the course of its work (pp. 2–4) and submitted draft articles concerning the law of the sea (pp. 4–12), together with its commentary thereon (pp. 12–45). Because the Commission found itself unable clearly to divide its draft articles into separate categories of codification of existing law and proposals for new development, it recommended the calling of an international conference to consider and adopt one or more conventions covering the entire subject (pp. 3–4).

Article 9 of the International Law Commission's draft articles treated roadsteads as territorial rather than inland waters, providing (*id.*, p. 5):

> Roadsteads which are normally used for the loading, unloading and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in the territorial sea. The

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[6] Resolution 174 (II), *Official Records of the Second Session of the General Assembly. Resolutions* (U.N. Doc. No. A/519), p. 105; Statute of the International Law Commission, *id.*, pp. 105–110.

[7] General Assembly Official Records: Eleventh Session, Supplement No. 9 (U.N. Doc. No. A/3159); reprinted, with different pagination, in the *Yearbook of the International Law Commission*, 1956, Vol. 2, pp. 253–302 (U.N. Doc. No. A/CN. 4/SER.A/1956/Add.1), and in 51 American Journal of International Law, p. 154 (1957).

> coastal State must give due publicity to the limits of such roadsteads.

In its commentary thereon, the International Law Commission explained its reasons (*id.*, p. 16):

> In substance, this article is based on the 1930 Codification Conference text. With some dissenting opinions, the Commission considered that roadsteads situated outside the territorial sea should not be treated as internal waters. While appreciating that the coastal State must be able to exercise special supervisory and police rights in such roadsteads, the Commission thought it would be going too far to treat them as internal waters, since innocent passage through them might then be prohibited. It considered that the rights of the coastal State were sufficiently safeguarded by the recognition of such waters as territorial sea.

Two years previously, the Commission had said that substantially the same draft provision "reproduces the international law in force."[8]

In accordance with the recommendation of the International Law Commission the United Nations arranged for a conference on the law of the sea, which met at Geneva and on April 29, 1958, adopted four conventions on that subject. These included a Convention on the Territorial Sea and the Contiguous Zone, Article 9 of which, like the Commission's draft

[8] *Report of the International Law Commission Covering the Work of Its Sixth Session, 3 June–28 July 1954* (U.N. Doc. No. A/CN.4/88), p. 41; reprinted in the *Yearbook of the International Law Commission*, 1954, Vol. 2, p. 156 (U.N. Doc. No. A/CN.4/SER. A/1954/Add. 1).

quoted above, declared roadsteads to be territorial waters:[9]

> Roadsteads which are normally used for the loading, unloading and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in the territorial sea. The coastal State must clearly demarcate such roadsteads and indicate them on charts together with their boundaries, to which due publicity must be given.

This convention along with the others on the law of the sea, was approved by the Senate on May 26, 1960 (106 Cong. Rec. 11196), and ratified by the President on March 24, 1961 (44 State Dept. Bull. 609). It is not yet in effect, because not yet ratified or acceded to by 22 nations, as required by Article 29 (106 Cong. Rec. 11175). However, since its ratification by the President, it has been recognized by the Department of State as embodying the present international law and the policy of the United States.[10]

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[9] U.N. Doc. No. A/CONF. 13/L.52; reprinted in S. Executives J to N, Inclusive, 86th Cong., 1st Sess., p. 16, and in 106 Cong. Rec. 11174 (1960).

[10] On January 15, 1963, Secretary of State Rusk said in a letter to the Attorney General (2 International Legal Materials 527, 528): "Although the Convention is not yet in force according to its terms because twenty-two States have not yet ratified or acceded to it, nevertheless, it must be regarded in view of its adoption by a large majority of the States of the world as the best evidence of international law on the subject at the present time. * * * Furthermore, in view of the ratification of the Convention by the President with the advice and consent of the Senate, it must be regarded as having the approval of this Government and as expressive of its present policy. * * *"

It is thus evident that there is no justification in international law for treating open roadsteads as inland waters.

2. DOMESTIC LEGISLATION

There is nothing in the domestic legislation of the United States to show any intention to treat open roadsteads as inland waters, either in California or elsewhere.

Article XII of the California Constitution of 1849, which was approved by the Congress when the State was admitted to the Union, described the State as including "all the islands, harbors, and bays, along and adjacent to the Pacific Coast."[11] None of those terms embraces open roadsteads; and even if roadsteads were included, that provision would not give them the character of inland waters. The State constitution did not differentiate between inland waters and territorial sea.

Nor does the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. 1301–1315, give open roadsteads the character of inland waters or show that Congress so regarded them. That Act simply gave to California the submerged lands within its boundaries, extending not more than three geographical miles from the "coast line," which the statute defined as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." Section 2, 43 U.S.C. 1301. The Act did not define "in-

[11] Article XXI, Section 1, of the present California Constitution of 1879 is similar.

land waters." A proposed definition,[12] included in Section 2(c) of the bill as introduced in the Senate, was deleted by the Senate committee "because of the committee's belief that the question of what constitutes inland waters should be left where Congress finds it." S. Rep. No. 133, 83d Cong., 1st Sess., p. 18 (Cong. Doc. Ser. No. 11659). And, as we have pointed out, open roadsteads were nowhere defined as inland waters at that time (see, *supra*, pp. 6–15). Indeed, the Act has the necessary effect of excluding open roadsteads from inland waters; for by definition an open roadstead is part of the "open sea," and the Act provides that on the open sea the three-mile belt of territorial waters shall be measured from the low-water line.

Whether we look to international law or to domestic law, there is no justification for treating open roadsteads as inland waters.

II

ARTIFICIAL STRUCTURES AND CHANGES IN THE SHORELINE, MADE AFTER MAY 22, 1953, DO NOT ENLARGE CALIFORNIA'S RIGHTS IN SUBMERGED LANDS

The Special Master recommended that the outermost permanent harbor works be accepted as the *prima facie* limit of the inland waters of a port or harbor (Report, p. 4; see *supra*, pp. 5–6), that "The 'ordinary low-water mark on the coast of California'

[12] The proposed definition did not mention roadsteads. It read, "which include all estuaries, ports, harbors, bays, channels, straits, historic bays, and sounds, and all other bodies of water which join the open sea." S. Rep. No. 133, 83d Cong., 1st Sess., p. 14 (Cong. Doc. Ser. No. 11659).

is the intersection with the shoreline (as it exists at the time of survey) of the plane of the mean of all low waters * * *'' (Report, pp. 4–5), and specifically that the coastline embraces submerged areas that have been reclaimed by artificial fill or enclosed by artificial structures (Report, pp. 44–46). The United States has excepted to those rulings insofar as they apply to artificial structures and artificial fill created after May 22, 1953. Exceptions Nos. 1, 2, 9, and 10, *supra*.

In the view of the United States those rulings and recommendations of the Special Master were erroneous when made, insofar as they related to areas reclaimed or enclosed by artificial fill or structures made after the State entered the Union. However, we concede that the Submerged Lands Act of May 22, 1953, gave to the State all areas reclaimed or enclosed by artificial fill or structures on the effective date of the Act, together with the submerged lands extending three miles seaward therefrom; so that we now except only as to fill or structures subsequently created.

1. EFFECT OF ARTIFICIAL STRUCTURES AND FILL ON CALIFORNIA'S PROPRIETARY RIGHTS

While conceding that artificial harbor works and artificial fill provide the baseline from which to measure the outer limit of the territorial waters of the United States, the United States denies that they should affect proprietary rights, except where Congress has specifically so provided.

The general common law rule is that where water lines form the boundaries of property, artificial

changes in the water line will not effect any change in ownership. *Marine Ry. Co.* v. *United States,* 257 U.S. 47 (riparian owner not entitled to fill made by United States in Potomac River); *United States* v. *Mission Rock Co.,* 189 U.S. 391 (United States, as owner of islands in San Francisco Bay, not entitled to surrounding fill made by State's grantee of submerged lands); *United States* v. *Turner,* 175 F. 2d 644 (C.A. 5), certiorari denied, 338 U.S. 851 (owner of island neither lost title to part that he dredged nor gained title to adjacent area that he filled).[13] In *Barney* v. *Keokuk,* 94 U.S. 324, 337–338, this Court said:

> It is generally conceded that the riparian title attaches to subsequent accretions to the land effected by the gradual and imperceptible operation of natural causes. But whether it attaches to land reclaimed by artificial means from the bed of the river * * * is a question which each State decides for itself. By the common law, as before remarked, such additions to the land on navigable waters belong to the crown * * *. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine. If they choose to resign to the riparian proprietor rights which properly

[13] For other cases applying this common law rule, see Note, 91 A.L.R. 2d 858, 860–863 (where upland owner fills publicly owned submerged land), 863–864 (where upland owner fills submerged land owned by third person), 873–877 (where fill is by owner of submerged land), 881–883 (where fill is by third person).

> belong to them in their sovereign capacity, it is not for others to raise objections. * * *

Various States have modified this common law rule in one respect or another;[14] but such changes need not concern us here. They could not detract from the proprietary rights of the United States. As pointed out in *Barney* v. *Keokuk, supra,* the State's right to change the rule rests simply on its power to relinquish its own rights to others. It has no such authority to diminish rights of the United States. This was the holding in *United States* v. *State of Washington,* 294 F. 2d 830 (C.A. 9), certiorari denied, 369 U.S. 817, where the court held that a supposed State rule, depriving coastal owners of all accretions formed after statehood, could not apply to coastal lands held by the United States, first as public lands and later in trust for certain Indians. The boundary between upland retained by the United States and tidelands that passed to the State on statehood is a boundary created by the federal constitutional rule that ownership of the tidelands is an attribute of State sovereignty. The federal law that created the boundary must determine its character. Where the federal law makes the boundary movable by only one means, natural accretion, State law cannot make it movable by another, such as artificial fill.

However, it is not necessary to pursue here the question of how far State law can make artificial fill an effective means of moving a littoral property line, for it is clear that California has not attempted to do

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[14] For cases applying state modifications of the common law rule, see Note, 91 A.L.R. 2d 867–871, 877–878, 883.

so at all. On the contrary, California adheres to the common law rule that artificial changes do not affect maritime property lines. *City of Los Angeles* v. *Anderson,* 206 Cal. 662; *Patton* v. *City of Los Angeles,* 169 Cal. 521; *City of Newport Beach* v. *Fager,* 39 Cal. App. 2d 23. Indeed, California has gone further, and even treats gradual accretion induced by artificial structures as "artificial accretion" within this rule, *People* v. *Hecker,* 179 Cal. App. 2d 823, although the federal common law rule treats it as natural, *County of St. Clair* v. *Lovingston,* 23 Wall. 46, 66–69; cf. *Oklahoma* v. *Texas,* 265 U.S. 493, 499. This peculiarity of the California law is not of direct concern here, since the parties are agreed that this local rule does not affect rights as between the United States and the State. (See Report of the Special Master, p. 44.) However, it does emphasize California's adherence to the common law view that artificial changes in the shore line do not affect property rights.

Where natural accretion occurs along the shore, its effect will be to move seaward the boundary between the upland and the tideland owned by the State or its grantee. *Jefferis* v. *East Omaha Land Co.,* 134 U.S. 178, 189; *Banks* v. *Ogden,* 2 Wall. 57, 67; *Jones* v. *Johnston,* 18 How. 150; *New Orleans* v. *United States,* 10 Pet. 662, 717; *United States* v. *State of Washington, supra; City of Los Angeles* v. *Anderson, supra; Strand Improvement Co.* v. *Long Beach,* 173 Cal. 765, 770–773; see *Stevens* v. *Arnold,* 262 U.S. 266, 270. However, this will cause no net loss to the State, for the seaward boundary of its marginal belt, being three

miles from the coast line, will move seaward correspondingly. Cf. *De Lancey* v. *Wellbrock*, 113 Fed. 103, 105 (C.C. S.D. N.Y.). But under the Special Master's view, the effect of artificial fill along the shore would be much more favorable to the State. Although artificial fill will not diminish the State's submerged lands on the landward side, *City of Los Angeles* v. *Anderson, supra; People* v. *Hecker, supra,* the Special Master's recommendation would recognize it as producing an extension of the State's submerged lands on the seaward side.[15] It is wholly illogical to say that the "coast line" which forms the landward limit of the State's submerged lands is to be determined by a different test from the "coast line" from which their seaward limit is measured. Artificial changes that do not divest the title of California or of any private owner should not divest the title of the United States.

It is of course true, as pointed out by the Special Master, that the United States, in its control over navigable waters, has complete power to control the making of artificial changes in the shore line. (Report, pp. 45–46.) Cf. *United States* v. *Republic Steel Corp.,* 362 U.S. 482. Thus, the United States could protect its title to submerged lands simply by

[15] Correspondingly, dredging of the shore, in his view, presumably would pull back the seaward boundary of the State's submerged lands, without giving the State title to the dredged area. Thus, if the shore were to be dredged back three miles, the State would be divested of its submerged lands altogether. However, this aspect of his holding is of no practical importance, as coastal land is rarely, if ever, dredged away to a significant extent.

refusing to permit any filling along the shore or the erection of any breakwaters. However, this is not a satisfactory solution to the problem. Decisions regarding shore and harbor improvements should be based on the desirability of the improvements themselves in relation to navigation and area development. It would be unfortunate indeed if the United States, in deciding whether to authorize such improvements, were put to the choice either to sacrifice socially desirable improvements, so as to protect its own interest in particular submerged lands, or to permit improvements only at the cost of losing those submerged lands.

2. EFFECT OF THE SUBMERGED LANDS ACT

The conclusion to be drawn from the foregoing discussion—that artificial changes in the shore line, including man-made harbor works, should have no effect on the extent of California's proprietary rights in submerged lands—has been modified somewhat by the Submerged Lands Act. That Act granted to California the submerged lands of the Pacific Ocean within three miles of the coast line, defining the "coast line" as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." Sections 2 and 3, 43 U.S.C. 1301 and 1311.

In our judgment, Congress intended this definition to embrace the same shore line and outer limit of inland waters as were then recognized for purposes of

international law. Those were the actual shore, whether natural or artificial,[16] and the outer limit of inland waters, whether naturally or artificially enclosed.[17]

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[16] Article 3 of the Convention on the Territorial Sea and the Contiguous Zone provides: "Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." 106 Cong. Rec. 11174. Obviously, charts will show the coast as it exists, regardless of whether it has resulted from natural or artificial processes. The corresponding provision drafted by the Second Sub-Committee at the 1930 Conference (see *supra*, p. 10) read: "For the purposes of this Convention, the line of low-water mark is that indicated on the charts officially used by the coastal State, provided the latter line does not appreciably depart from the line of mean low-water spring tides." *Acts of Conference*, p. 217.

[17] Article 8 of the Convention on the Territorial Sea and the Contiguous Zone provides: "For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast." 106 Cong. Rec. 11174. This followed the proposal of the International Law Commission, which said in its commentary, "The waters of a port up to a line drawn between the outermost installations form part of the internal waters of the coastal State." *Report of the International Law Commission Covering the Work of Its Eighth Session, 23 April–4 July 1956*, p. 16. At the Conference, Mr. Francois, Expert to the Secretariat, successfully opposed a Norwegian proposal to substitute "may be regarded" for "shall be regarded," saying that "States had long regarded harbour works such as jetties as part of their land territory and that practice should be universally recognized as unchallengeable." *United Nations Conference on the Law of the Sea, Official Records*, Vol. III: *First Committee (Territorial Sea and Contiguous Zone)* (U.N. Doc. No. A/CONF. 13/39), p. 142.

At the 1930 Conference, the Second Sub-Committee had similarly provided: "In determining the breadth of the territorial

As noted (*supra*, p. 16), the Senate committee which reported the Submerged Lands Act specifically rejected a proposed definition of inland water, stating "that the question of what constitutes inland waters should be left where Congress finds it." The legislative history of the Act contains evidence that Congress accepted the line then drawn in international law along the edge of lands which had been artificially filled. See, for example, the Statement of Senator Long in the course of the Senate committee hearings on the bill (Hearings, S. Committee on Interior and Insular Affairs, S.J. Res. 13, 83d Cong., 1st Sess. (Pt. 2), p. 1357):

> The bill spells out two things: One, that where the States have reclaimed land, they are entitled to take that reclaimed land and they can measure their present coastline out 3 miles from where, by action of man, they have reclaimed land. * * * Where there have been accretions, both manmade and natural, it is agreed under the terms of this bill that the coastline would be measured from the outward limit of those accretions.

That statement was near the end of several pages of discussion of boundary questions, and apparently reflected the consensus of the committee as disclosed by that discussion. It was not questioned by anyone.

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sea in front of ports, the outermost permanent harbour works shall be regarded as forming part of the coast," with the accompanying observation that "The waters of the port as far as a line drawn between the outermost fixed works thus constitute the inland waters of the coastal State." *Acts of Conference*, p. 219.

But while we do not dispute that the Submerged Lands Act granted a belt of submerged lands measured from artificial extensions of the coastline existing on the date of the Act, the grant is not to be understood to include artificial extensions made thereafter. The grant made by the Act was wholly in present terms, that the interests therein described "are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States" and their successors. Sec. 3(a), 43 U.S.C. 1311(a). It has long been held that similar present language in the Swamp Land Act of September 28, 1850, 9 Stat. 519, effected a grant *in praesenti*. "It was to operate upon existing things, and with reference to an existing state of facts. * * * There is not a word in the act to show that the grant was to be a continuing one." *Rice* v. *Sioux City & St. Paul R.R. Co.*, 110 U.S. 695, 698.[18] The holding there was that the Swamp Land Act did not apply to States subsequently admitted to the Union. Obviously Congress has so understood the Submerged Lands Act, for it has specifically acted to extend it to the two States later admitted. Alaska Statehood Act, sec. 6(m), 72 Stat. 339, 343; Hawaii Statehood Act, sec. 5(i), 73 Stat. 4, 6. Similarly, it has always been held that the Swamp Land Act applied only to lands having the character of swamp land on the date of the Act. As

[18] Other cases holding the Swamp Land Act to be a grant *in praesenti* include *Work* v. *Louisiana*, 269 U.S. 250, 255; *Rogers Locomotive Works* v. *American Emigrant Co.*, 164 U.S. 559, 570; *Wright* v. *Roseberry*, 121 U.S. 488, 495–500.

this Court said in *Michigan Land and Lumber Co.* v. *Rust*, 168 U.S. 589, 591:

> The act of 1850 made a grant *in praesenti*, in other words, the title then passed to all lands which at that date were swamp lands, and the only matters thereafter to be considered were those of identification. * * *

The Department of the Interior has uniformly held the Swamp Land Act applicable only to lands having the character of swamp lands on the date of the Act. *E.g., State of Oregon*, 28 L.D. 318, 320 (1899); *California* v. *United States*, 24 L.D. 68 (1897).

Just as the Swamp Land Act applied only to existing States and existing swamp lands, and as the Submerged Lands Act applies only to existing States, so must the latter Act also be construed as applying only to an existing "coast line" and existing "inland waters," at least so far as their character depends on artificial works. As this Court held in *Rice* v. *Sioux City & St. Paul R.R. Co., supra*, at 698, "Donations of the public domain for any purpose are never to be presumed." Here, as there, in the absence of any statutory language of future grant, it should not be presumed that a future grant was intended.

Thus, we submit that the Special Master was in error in recognizing artificial works as proper elements to take into account in establishing the baseline of California's marginal sea; that the Submerged Lands Act has subsequently cured his error as to artificial works existing on May 22, 1953; but that his recommendation is still erroneous as to works erected thereafter.

CONCLUSION

For the foregoing reasons, the United States submits that the Report of the Special Master should be modified in the particulars excepted to herein, and in all other respects should be approved as a correct determination of the issues with which it deals, affecting the location of the coastline of California.[19]

Respectfully,

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APRIL 1964.

[19] We are not aware of any disagreement between the parties as to other matters affecting the location of the baseline of the marginal sea or the measurement of the width of the marginal sea. If such disagreements should develop, they would be appropriate subjects for further supplemental proceedings.

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